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Prior to the Ship Mortgage Act it was settled law that a ship mortgage securing a personal loan to the shipowner was not, *ex proprio vigore,* foreclosable in admiralty—not because the Congress had not conferred such jurisdiction but because, under the Constitution as interpreted by this court, neither the loan, the primary contract, nor the mortgage, the incident thereof, was a maritime contract. The Congress has no power to extend admiralty jurisdiction to a nonmaritime contract	10-16
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The claim of unconstitutionality herein is deep rooted. The power of the Congress in connection with admiralty cannot transcend the jurisdiction delegated by the states to the Federal Government under the Constitution. The objection herein presents the serious question whether the legislative branch of the Federal Government has not encroached upon the reserved sovereign powers of the states.	

The attempted grant of admiralty jurisdiction herein would deprive the states of reserved jurisdiction over nonmaritime contracts because federal admiralty jurisdiction is exclusive. No state statute creating a maritime lien, justiciable in admiralty and thereby waiving reserved state rights, is involved. Subsection K, if applicable, is unconstitutional 18-22

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In The

Supreme Court of the United States

October Term, 1933.

Nos. 909-910.

DETROIT TRUST COMPANY, TRUSTEE,

Petitioner,

v.

Steamer THOMAS BARLUM, Her Engines, etc.,
BARLUM STEAMSHIP COMPANY,

Respondent.

DETROIT TRUST COMPANY, TRUSTEE,

Petitioner,

v.

Steamer JOHN J. BARLUM, Her Engines, etc.,
BARLUM STEAMSHIP COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(All Italics Supplied.)

The opinions delivered in the court below are now reported as *The Thomas Barlum, The John J. Barlum, 68 F. (2d) 946.*

This brief will be directed to the propositions that certiorari is not merited because:

The factual situations involved are so unusual as to be *sui generis.*

The decision below was clearly warranted.

Realizing that the facts presented were very exceptional and not typical of ship mortgage transactions, written argument in respondent's behalf in the court below was prefaced by the following statement:

> "It is not urged that the Ship Mortgage Act is unconstitutional in its entirety nor that Congress, having power to legislate concerning true maritime liens, could not *subordinate* certain of such liens to other, even common law, liens. It is not urged that a purchase money mortgage or a mortgage placed on a ship to raise funds for maritime purposes would be invalid or necessarily without the jurisdiction of the admiralty court. Such contentions are not necessary or pertinent herein. *What is urged is that these particular mortgages, by intendment of the parties and under the circumstances established by the record, were so devoid of connection with maritime purposes that the provisions of Subsection K of the Ship Mortgage Act, 46 U. S. C. A., § 951, conferring original foreclosure jurisdiction on the district court in admiralty, either does not, or cannot constitutionally, apply.*"

This restriction of the issues was clearly recognized by the Circuit Court of Appeals in the prevailing opinion [*68 F. (2d) 948-949*] as follows:

> "Appellant argues that these mortgages, as the record establishes, were so devoid of connection with maritime purposes and subjects, that the statute should not be construed to confer and cannot confer original jurisdiction of foreclosure in admiralty. * * *

"If it were established that these mortgages were given to support an issue of bonds 'to develop and encourage the maintenance of such a merchant marine' and therefore in accord with the objects of the Ship Mortgage Act, the admiralty jurisdiction to foreclose would be unquestionable. We need not decide whether or not a loan made for maritime purposes secured by a mortgage on a ship will become nonmaritime if the borrower, contrary to the agreement of the mortgage, diverts the money to nonmaritime purposes, nor need we consider what effect any estoppel in such a case would have. We are not called upon to say whether or not Congress could in any event extend the admiralty jurisdiction to a matter so closely related to transportation by navigable waters as to provide for the exclusive enforcement in admiralty of a mortgage on a ship actually engaged in such transportation. It is sufficient to point out here that the mortgagor and mortgagee both knew in advance of making these mortgages that the moneys advanced were not to be used for such purposes, but were intended for and actually were used for nonmaritime purposes. This was fully disclosed at the trial. * * *

"* * * Nowhere in the Merchant Marine Act or the Ship Mortgage Act is it anywhere shown that Congress intended that ship mortgages given by owners to support outside operations such as real estate ventures or to pay past debts not arising in maritime transactions were in contemplation. Mortgage loans of this character are foreign to the idea of maritime operations. The mortgages in question having been shown to be nonmaritime in intent and character, the admiralty court did not have jurisdiction, and the application to dismiss the suit should have been granted."

The minority opinion erroneously assumes and states that respondent contended that the Congress could not confer the status of a *preferred mortgage* upon any other than a true maritime mortgage. Respondent made no

such contention. Respondent did contend that there was a distinction between a preferred *mortgage* lien and a *maritime* lien and between the congressional power to confer preference right upon a nonmaritime mortgage by subordination of maritime liens thereto and the power by fiat to *convert a nonmaritime* lien into a *maritime* lien and make it, *per se*, the subject of *original* admiralty jurisdiction.

The minority opinion also assumes that unless original foreclosure jurisdiction under Subsection K of the Ship Mortgage Act is upheld herein the power of the Congress to give a mortgage preference in distributions is necessarily destroyed. *That problem is not involved in this record.*

The unusual facts referred to require additional statement.

ADDITIONAL STATEMENT OF FACTS.

Respondent, Barlum Steamship Company, claimant below, is a West Virginia corporation with principal office at Detroit, Michigan. At the times involved it was, and still is, owner of two steel steamers plying the Great Lakes known as the "Thomas Barlum" and "John J. Barlum" (R. 9, 29, 63, 82). John J. Barlum was president and Thomas Barlum was secretary of the company (R. 51, 99). In 1927 and 1928 its 3200 shares were held by 14 stockholders, John J. Barlum holding 2561 shares. In 1929 it had 11 stockholders, John J. Barlum holding 2651 shares (R. 197-199, 250). As a matter of convenience the company maintained separate bank accounts for the steamers and in separate banks (R. 171, 191).

John J. Barlum was connected with several enterprises. *Detroit Trust Co. for years had done business with Mr. Barlum and certain of these enterprises* (R. 133). *"Barlum Land Co."* was an assumed name used by Mr. Barlum in connection with certain of his individual fee and leasehold real estate holdings, including those known as Lawyers Building, Dixie Land and Lewis Hotels. In 1925 Mr. Barlum and wife executed a $1,250,000 bond issue mortgage to Detroit Trust Co. as Trustee covering these properties and thereafter conveyed them to *"Barlum Land & Improvement Co.,"* a Michigan corporation, in exchange for its entire capital stock (R. 157, 170, 201-202, 210). *"Barlum Realty Co."* is a Michigan corporation owning a forty-story Detroit office building, in which corporation John J., Thomas J. and Louis Barlum, proportions not shown, owned the entire capital stock (R. 171, 210). *"Cadillac Square & Improvement Co."* is a limited partnership association which built, owns and operates a twenty-story hotel known as Barlum Hotel, Detroit (R. 186). The stock in the association is owned by the three Barlum brothers, William B. Thompson and his two sons, and three sisters of the Barlums—neither the Thompsons nor the sisters having any interest in the steamship company (R. 210). *"Thomas Barlum & Sons Co."* was a Michigan corporation engaged in the meat packing business in Detroit. Its stock was owned by John J., Thomas J. and Louis P. Barlum. John was manager and head (R. 200, 206-207). It had made extensive loans from Detroit Trust Co. (R. 200). *The steamship company had no interest in the stock or assets of Barlum Land Co.* (R. 202), *Barlum Land & Improvement Co.* (R. 184-203), *Barlum Realty Co.* (R. 203), *Cadillac Square & Improvement Co.* (R. 187, 203), *or Thomas Barlum & Sons Co.* (R. 210), *nor did any of these have any interest in the steamship company* (R. 202-203).

Prior to the making of either mortgage under foreclosure herein respondent had executed to petitioner a $100,000 mortgage on the "Thomas Barlum" dated December 1, 1924 (R. 133, 135, 144), paid down to $50,000 and refunded by a similar mortgage for $75,000, dated February 15, 1927 (R. 141, 171, 223-225). The mortgage of December 1, 1924, was intended to, and did, secure a loan by petitioner to respondent to pay a tax claim which the Government was asserting against respondent (R. 136, 169-170, 199, 201, 221-222).

$200,000 "Thomas Barlum" mortgage, March 1, 1929: *This is the mortgage foreclosed by the decree of the district court herein in suit No. 1794.* By February, 1929, the $75,000 mortgage had been reduced to $50,000. Negotiations were had with the trust company for an increased loan (R. 146). On February 21, 1929, the trust company, per Mr. Butler, vice-president, wrote respondent (Exhibit 7; R. 227-230, 146-147) offering to purchase, at 97%, $200,000 of bonds secured by mortgage on the "Thomas" guaranteed by John J. Barlum, documents to be prepared by the trust company's attorneys, and (R. 228) stating:

> *"It is understood that as a condition of the above the proceeds of the purchase of said bonds by us are to be used as follows:*
>
> | | |
> |---|---|
> | To pay the note issue now outstanding secured by mortgage on the same steamer | $50,000.00 |
> | Interest on the same from February 15th to which it is now paid up to March 1st, 1929 | 125.00 |
> | Annual fee due the trustee | 25.00 |
> | Closing fee due the trustee | 25.00 |
> | Attorneys' charges estimated | 750.00 |
> | Trustee's fee for certifying new bonds | 200.00 |
> | Cost of printing new bonds estimated | 100.00 |
> | *To take up principal debt of John J. Barlum and Thomas Barlum & Sons now held by us to the amount of* | 100,000.00 |

Balance to Steamship Company for repairs and refitting the steamers "Thomas Barlum" and "John J. Barlum" for the season of 1929 ..... 42,775.00"

The $100,000 debt of Mr. Barlum and Thomas Barlum & Sons was for collateral loans long previously made to them respectively by the trust company and had no relation to respondent. Mr. Butler was fully informed as to the details of such debt (R. 147, 151-153, 162-164) *and it was contemplated that the debt should be paid as indicated* (R. 204).

The mortgage, prepared by the trust company's attorneys (R. 213), dated as of March 1, 1929, was executed and delivered about March 22, 1929, while the boat was laid up. Exhibit A attached to libel (R. 17-60) is a copy of the mortgage.

The application to the Securities Commission (prepared by the trust company) relating to this $200,000 mortgage, stated the purpose of the issue was to "refinance" (R. 150; Exhibit 9, R. 234). As shown by the trust company's statement (Exhibit 8; R. 231-232), it withheld from the proceeds of the issue $50,358.33 to take up the balance of the previous mortgage, $1545.23 for trustee and attorney fees, printing, recording, etc., and:

"Amount required to take up Thomas Barlum & Sons note, being principal and interest		$45,510.00
Amount necessary to take up John J. Barlum note, being principal and interest		33,566.50
Amount to apply on account of principal of John J. Barlum note	$20,745.50	
Accrued int. to March 25th..	178.00	20,923.50
Balance to Barlum Steamship Company		42,896.44"

Respondent deposited the $42,896.44 in bank account "Steamer John J. Barlum" at National Bank of Commerce and paid therewith about $22,000 of accounts relating to the *"John J."* and transferred $20,000 of the balance to the bank account "Steamer Thomas Barlum" at the American State Bank and out of which were paid running accounts allocated to the "Thomas" on account of its previous season's operations (R. 178-183; Exhibit 19, R. 246-249).

$200,000 "John J. Barlum" mortgage, December 15, 1927: *This is the mortgage foreclosed by the decree of the district court herein in suit No. 1795.* Exhibit 13 (R. 235-236, 155) is the accepted written offer by the trust company to respondent dated December 23, 1927, to purchase an issue of $200,000 of respondent's bonds on the "John J." at 98, to be guaranteed by John J. Barlum, documents to be satisfactory to trust company's attorneys. The mortgage, dated as of December 15, 1927 (Exhibit A to libel, R. 71-114), prepared by the trust company's attorneys (R. 213) was executed about January 5, 1928, while the boat was laid up. *The understanding was that $82,281.25 was to be withheld by the trust company to pay $50,000 principal and $32,281.25 interest on the $1,250,000 bond issue mortgage executed by John J. Barlum and wife to the trust company on the individual real estate and leaseholds of Mr. and Mrs. Barlum as aforesaid and also that $10,000 was to be retained by the trust company and applied on an individual note executed by Mr. Barlum to the trust company dated August 11, 1927, evidencing a personal loan made to Mr. Barlum by the trust company* (Exhibit 15, R. 238, 239; Exhibit 15-A, R. 240, 156-158, 205). *Respondent had no connection with such items for which said sums were to be withheld.* Such items, together with certain trustee and attorney fees and expenses, were withheld according

to the understanding. The remainder of the proceeds of the loan was deposited in the bank account of the *"Thomas"* and used as follows: Paid to engineer of the *"Thomas"* for past season services $500; loan to *Thomas Barlum & Sons Co.* $4000; loan to *Cadillac Square Improvement Co.* $52,500; loan to *Barlum Realty Co.* $18,600; loan to *John J. Barlum personally* $5500 (used by him in paying an individual note held by the Romeo Savings Bank); loan to *Lewis Hotel* $19,000 (being one of the properties covered by the $1,250,000 mortgage given by John J. Barlum and wife to the trust company); paid to the captain of the "John J." $500 for services in connection with that steamer and $2000 was transferred to the "Steamer John J. Barlum" account (R. 183-189). *Out of the entire proceeds of the issue only the $500 paid to the master of the "John J." and the $2000 transferred to its account had any connection with the "John J."* (R. 188).

Remedy provided in mortgages: *The sole remedy for foreclosure stipulated in the mortgages is by seizure and sale "WITHOUT" process of any kind* (R. 36-38, 89-91).

Cases so atypical as these do not merit the coveted review nor justify the broad assertions made by petitioner as to the harmful effect of the decision below. No similar case appears to have been presented to the courts in the fourteen years the Ship Mortgage Act has been in effect. It is respectfully submitted that the review sought should await a record in which the questions raised by petitioner were squarely involved or decided.

ARGUMENT—MERITS.

MORTGAGE NONMARITIME.

Prior to the Ship Mortgage Act it was settled law that a ship mortgage securing a personal loan to the shipowner was not, ex proprio vigore, foreclosable in admiralty—not because the Congress had not conferred such jurisdiction but because, under the Constitution as interpreted by this court, neither the loan, the primary contract, nor the mortgage, the incident thereof, was a maritime contract. The Congress has no power to extend admiralty jurisdiction to a nonmaritime contract.

Article III of the Constitution provides:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."
>
> "Section 2. The judicial Power shall extend * * * to all Cases of admiralty and maritime jurisdiction; * * *."

Perforce Section 1, supra, the Congress, by the Judiciary Act of 1789, conferred upon the district courts original jurisdiction:

> "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it * * *." *28 U. S. C. A. § 41 (3). Vide, Part 2 Constitution, U. S. C. A. n. 152.*

This court early dispelled the idea that the admiralty jurisdiction thus conferred upon the federal courts was

the circumscribed power of the English admiral at the time of the adoption of the Constitution.

> *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston (1848), 6 How. 344, 12 L. Ed. 465.*

That this court was fully conscious of the desirability of making federal admiralty jurisdiction as comprehensive as the needs of navigation, is attested by the above case as well and by the decision of *The Genesee Chief (1851), 12 How. (53 U. S.) 443, 13 L. Ed. 1058,* holding that the admiralty jurisdiction was not limited to tide waters. Certainly this court accorded the constitutional provisions a broad, rather than a restricted, interpretation and in view of such a tendency this court's refusal to uphold jurisdiction over ship mortgages is of great significance.

Bogart v. The Steamboat John Jay (1854), 17 How. (58 U. S.) 399, 15 L. Ed. 95: Libelants had sold the steamer to McMurray, taking a purchase money mortgage for part of the sale price. Upon default in payment of the mortgage note libelants filed libel against the steamer.

> "To this libel George Logan, by way of answer, put in a claim of ownership of The John Jay, by a *bona fide* purchase from McMurray; and he further denies the jurisdiction of the court, upon ground that the contract between the libelants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction * * *.
>
> "Upon the hearing of the cause in the district court, the libel was dismissed * * *. We think that the affirmance of the judgment of the district court was right, and will here briefly give our reasons for that opinion.

"It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune, 3 Hagg., Adm. Rep. 132,* Sir John Nicholl, in giving his judgment, observes: 'Now, upon questions of mortgage, the Court of Admiralty has no jurisdiction, whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, *the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty,* which never decide on questions of property between the mortgagee and owner.'

"This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. *Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime."*

There was no dissent from this opinion and seven of the justices who participated in the decision of The Genesee Chief in 1851 were still members of this court.

Schuchardt v. Ship Angelique (1856), 19 How. (60 U. S.) 239, 15 L. Ed. 625.

Mortgagees filed *libel* in the district court against the proceeds of a ship sold under decrees entered upon other libels based on maritime liens. The court dismissed the mortgagee's libel, saying:

"The libel filed in this case is a libel simply to foreclose a mortgage, or to enforce the payment of a mortgage, and the proceeding cannot therefore be upheld within the case of Bogart v. The John Jay, heretofore decided by this court (17 How.) 58 U. S. 399.

*"The proper course for the mortgagees was to have appeared as claimants to the libels filed against the vessel, in which the questions presented in the case might have been raised and considered * * *.*

The People's Ferry Co. v. Beers (1858), 20 How. (61 U. S.) 393, 15 L. Ed. 961.

Libel against a new ferry boat for balance due the builders for its construction under a contract reserving a lien to secure payment. The district court upheld admiralty jurisdiction. In reversal, this court said:

"The lien reserved by the contract, is not set up in the libel, *nor can it avail, as it amounted to nothing more than a mortgage on the vessel for a debt* * * *.

"The question presented involves a contest between the State and Federal Governments. The latter has no power or jurisdiction beyond what the Constitution confers; * * *. The extent of power withdrawn from the States, and vested in the*

General Government, depends on a proper construction of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now; what was reserved to the States, to be regulated by their own institutions, cannot be rightfully infringed by the General Government, either through its Legislative or Judiciary Department. The contest here is not so much between rival tribunals, as between district sovereignties, claiming to exercise power over contracts, property, and personal franchises * * *.

"*The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation* * * *.

"*In considering the foregoing description, it must be borne in mind that liens on vessels encumber commerce, and are discouraged;* so that where the owner is present, no lien is acquired by the materialman; nor is any, where the vessel is supplied or repaired in the home port * * *. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), *it was a contract made on land, to be performed on land.* The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel

had no interest or concern whatever in the vessel

after she was delivered to the party for whom she was built; they were bound to rely on their contract * * *."

The Lottawanna (1874), 21 Wall. (88 U. S.), 558, 22 L. Ed. 654:

"*In this case the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They,*

therefore, have no standing in court, except under the 43rd Admiralty Rule, and in the manner above indicated."

The J. E. Rumbell (1892), 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345:

> *"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it or to assert either title or right of possession under it* * * *. But it has jurisdiction, after a vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case * * *.
>
> *"The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien,* * * *."

The Freights of the Kate (D. C. N. Y.), 63 Fed. 707, 720, in which Mr. Justice Brown said:

> "A letter of credit, like a loan of money, is in itself indifferent in character; it may be maritime, or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it. Maritime contracts are contracts that pertain to maritime commerce and navigation. A letter of credit issued for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is as purely maritime as a bottomry bond; and no commercial transactions are more characteristically maritime than these."

A note is the primary obligation to which a mortgage securing it is merely an incident.

Carpenter v. Longan, 16 Wall. (83 U. S.) 271, 21 L. Ed. 313.

The foregoing decisions clearly state the factors which render a loan and ship mortgage nonmaritime in character. The loans herein were merely *personal* contracts in no way involving navigation or the perils of the sea. The mortgages were merely *security* for performance of the personal contract and in no way involved the use of the steamers in navigation.

MARITIME LIENS ENCUMBER COMMERCE AND ARE *STRICTI JURIS.*

Krauss Bros. Lumber Co. v. Dimon S. S. Corp., Vol. 78 Adv. Op. page 91;
The Kalfarli (C. C. A. 2), 277 Fed. 391;
The People's Ferry Co. v. Beers, infra, page 13.

IN ANY EVENT THE FACT THAT THE CONTRACTS INVOLVED WERE NOT WHOLLY MARITIME WOULD PRECLUDE ORIGINAL ADMIRALTY JURISDICTION.

Grant v. Poillon, 20 How. (61 U. S.) 162, 15 L. Ed. 871:

> "The jurisdiction of courts of admiralty is limited, in matters of contract, to those, *and to those only*, which are maritime."

Accord: *Rea v. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269.*

Pillsbury Flour Mills Co. v. Interlake SS. Co. (C. C. A. 2), 40 F. (2d) 439, certiorari denied in *282 U. S. 845, 51 S. C. 24, 75 L. Ed. 750:* Libel for damage to wheat shipped under contract for transportation from Milwaukee to Buffalo and winter storage at destination. In denying admiralty jurisdiction the court said:

> "'A contract to be "wholly maritime," means that the principal subject matter of agreement gives character to the whole.' * * *. After reviewing the cases, we concluded that contract rights are maritime and within the admiralty jurisdiction when they relate to the ship as an instrument of commerce, and pointed out that a contract for the wharfage of a ship withdrawn from commerce is not maritime and will not support a maritime lien."

The Richard Winslow (C. C. A. 7), 71 Fed. 426:

> *"A maritime contract must therefore concern transportation by sea. It must relate to navigation, and to maritime employment. It must be one of navigation and commerce on navigable waters.* Unquestionably there was here a contract for carriage by sea, and that contract was maritime in its nature. *But there was joined with it a contract with respect to the cargo after the completion of the voyage that was in no respect maritime in its nature* * * *."

ADMIRALTY COURTS ARE NOT COURTS OF EQUITY.

The Ada (C. C. A. 2), 250 Fed. 194;
Kellum v. Emerson, Fed. Cas. No. 7669.

CONGRESS—LACK OF POWER.

THE CLAIM OF UNCONSTITUTIONALITY HEREIN IS DEEP ROOTED. THE POWER OF THE CONGRESS IN CONNECTION WITH ADMIRALTY CANNOT TRANSCEND THE JURISDICTION DELEGATED BY THE STATES TO THE FEDERAL GOVERNMENT UNDER THE CONSTITUTION. THE OBJECTION HEREIN PRESENTS THE SERIOUS QUESTION WHETHER THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT HAS NOT ENCROACHED UPON THE RESERVED SOVEREIGN POWERS OF THE STATES. THE ATTEMPTED GRANT OF ADMIRALTY JURISDICTION HEREIN WOULD DEPRIVE THE STATES OF RESERVED JURISDICTION OVER NONMARITIME CONTRACTS BECAUSE FEDERAL ADMIRALTY JURISDICTION IS EXCLUSIVE. NO STATE STATUTE CREATING A MARITIME LIEN, JUSTICIABLE IN ADMIRALTY AND THEREBY WAIVING RESERVED STATE RIGHTS, IS INVOLVED. SUBSECTION K, IF APPLICABLE, IS UNCONSTITUTIONAL.

Vide, *The People's Ferry Co. v. Beers, infra, page 13,* and *The Genesee Chief, infra, page 11.*

No interstate commerce is involved in the present controversy. It is significant that in Article I, Section 8 of the Constitution, defining the power of the Congress, the subject of admiralty is not mentioned. The connection of the Congress with that subject is through Article III, Section 1 which permits the Congress to *apportion the judicial power conferred by the states but which cannot sustain an arrogated increase of power.*

Crowell v. Benson, 285 U. S. 22, 55, 52 S. Ct. 285, 76 L. Ed. 598, 615, upholding The Longshoremen's and Harbor Workers' Act providing compensation to workmen for injuries occurring *upon navigable waters.* This court, by Mr. Chief Justice Hughes, said:

> *"These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.*
>
> *"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction * * *. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations * * *."*

The Congress cannot enlarge the grant of admiralty jurisdiction.

> *Meyer et al. v. Tupper (1861), 66 U. S. (1 Black) 522, 17 L. Ed. 180;*
>
> *The Lottawanna (1874), 88 U. S. (21 Wall.) 588, 22 L. Ed. 654.*

Federal admiralty jurisdiction to enforce a lien is exclusive.

> *The Moses Taylor v. Hammons, 4 Wall. (71 U. S.) 411, 18 L. Ed. 397;*
>
> *The Belfast, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266;*

American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 522, 21 L. Ed. 369;
The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345;
The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. Ed. 770;
Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73;
The Winnebago (C. C. A. 6), 141 Fed. 945, certiorari denied, 200 U. S. 616.

Subsection K of the Ship Mortgage Act expressly provides that jurisdiction thereunder shall be exclusive.

Prior to the Ship Mortgage Act an ordinary ship mortgage securing a general loan to the ship owner was a local matter and, as such, was within the jurisdiction of the state courts both as to actions *in personam* and *in rem*. If the Congress, by its fiat, can convert such a mortgage into a maritime lien, the jurisdiction of the state is automatically divested. This, it is respectfully contended, cannot be done without the states approval or amendment of the Constitution.

The Congress may prescribe forms, mode and rules of judicial proceedings within the defined admiralty jurisdiction of the courts but cannot make maritime a non-maritime cause or transaction. Within such confines only can it be said that the Congress may amend the admiralty law. Analysis will disclose no decision upholding congressional regulation except as to a matter unquestionably maritime. For example:

In *The General Smith, 4 Wheat. 438, 4 L. Ed. 609,* this court drew the sharp distinction between "process" and "jurisdiction" saying that the creation by local law of a lien enforceable *in rem* in admiralty for ship supplies

was merely to supply a *process* in connection with *existent* maritime jurisdiction *because the contract for supplies was in itself maritime and within the established jurisdiction of the admiralty court to proceed in personam.* Nothing more than *a mode of procedure was involved.*

In *Meyer et al. v. Tupper et al., infra, page 19,* the same view was taken as to *Admiralty Rule 12* recognizing such liens.

In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 27 L. Ed. 1038, this court said:*

> "The rule of *limited liability* prescribed by the Act of 1851 is nothing more than the old maritime *rule* administered in courts of admiralty in all countries except England from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of martime law."

The underlying cause of action involved was unquestionably maritime and over which the admiralty court had jurisdiction. *The act of Congress merely controlled the procedure relating to the enforcement of that jurisdiction and, in our opinion, did no more than alter a rule of recoverable damages in such cases.* The same is true of *Richardson v. Harmon* on which petitioner relies, wherein the underlying cause of action was the liability of a ship which, in its navigation, damaged a bridge.

In *Crowell v. Benson, infra, page 19,* the claims to which the Act applied were within the admiralty jurisdiction. This court therein specifically repudiated the idea that the Congress could create a maritime *cause of action* where none previously existed and denied that the Congress could even substitute findings for ultimate court decision as to the existence of *jurisdictional* facts.

Panama R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, upheld the Jones Act on the theory that it did not create a maritime cause of action but merely regulated procedure.

To create a lien in connection with a matter already subject to maritime jurisdiction is one thing—*but to attempt thereby to create jurisdiction where none existed is another.* That the existence of a lien merely has not been an accepted basis of our admiralty jurisdiction is also attested by the fact that under the civil law many liens against ships existed but such liens were not enforceable in original proceedings *in rem* under our law because, notwithstanding the existence of such liens, the underlying cause of action was, by our courts, held to be nonmaritime.

The states have not voluntarily yielded their control over nonmaritime mortgages and until they do, it is respectfully submitted, the Congress cannot arbitrarily force them to do so by conferring exclusive jurisdiction thereover upon the federal courts. Subsection K is unconstitutional, if it is applicable.

APPLICABILITY OF SUBSECTION K, SHIP MORTGAGE ACT.

A FAIR CONSTRUCTION OF THE SHIP MORTGAGE ACT JUSTIFIED THE HOLDING THAT IT DOES NOT APPLY TO THE PARTICULAR MORTGAGES INVOLVED. THE ACT SHOULD BE SO CONSTRUED.

Crowell v. Benson, infra, page 19:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case."

Accord: *Panama R. R. Company v. Johnson, 264 U. S. 375, 44 S. C. 391, 68 L. Ed. 748.*

Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239:

> "A statute may be invalid as applied to one state of facts, and yet be valid as applied to another."

The Ship Mortgage Act is also known as Section 30 of the Merchant Marine Act 1920. *Vide* historical notes to 46 U. S. C. A., § 861 and § 911.

Appellee argues that the decision below will defeat the desired and necessary results which the Merchant Marine Act was designed to accomplish.

Section 1 of the Merchant Marine Act, 1920, 46 U. S. C. A., § 861, reads:

> "It is necessary for the national defense and for

the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this chapter, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained."

We can easily perceive that the Congress might have power to extend admiralty jurisdiction to matters *directly connected with maritime operations* and that it might be contended successfully that a ship construction or purchase money mortgage, executed as an incident to placing, continuing or maintaining the ship in operation and navigation, is a proper subject for federal legislation, *but the Ship Mortgage Act and the Merchant Marine Act may be searched in vain for any indication that ship mortgages given by shipowners for construction and operation of office buildings and hotels and payment of real estate bonds and personal obligations of others, would so contribute to the purposes of the acts as to be within their contemplation. Such mortgages are not only foreign, but in fact opposed, to the true intent and purpose of the acts.* That such a conclusion is not without judicial support is evident from the following statement in *Peoples Ferry Co. v. Beers, infra, page 13:*

"* * * it must be borne in mind that liens on

vessels encumber commerce and are discouraged; * * *."

That the liens against The Thomas and The John J. have encumbered commerce is attested by their consequent enforced idleness since May, 1921.

Section 36 of the Merchant Marine Act, 46 U. S. C. A., § 887, provides:

> "If any provision of this and the following chapter is declared unconstitutional *or the application of any provision to certain circumstances be held invalid,* the remainder of such chapters and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

The "following chapter" referred to is the Ship Mortgage Act.

Even in the absence of such a saving clause the courts have generally held that partial invalidity does not necessarily require holding an entire act unconstitutional. For federal cases making elision and enforcing remainder see list appended to the decision in *Roberts v. Atlantic Oil Producing Co. (C. C. A. 6), 295 Fed. 16, 19.*

It is quite significant that the Congress in Subsection K of the Ship Mortgage Act did not attempt to say that a preferred mortgage created by the act was to be a *"maritime lien"* but merely provided that such be a *"preferred mortgage lien."* It is submitted the act should not have been accorded an unconstitutional purpose but was properly held inapplicable to the mortgages herein. The act, even if inapplicable to the instant mortgages can nevertheless be applicable to all maritime mortgages

and even as to nonmaritime mortgages may possibly have the lawful effect of establishing the basis of priority as against true maritime liens.

On page 9 of petitioner's brief counsel cite:

> *The Oconee (D. C. Va., 1922), 280 Fed. 927;*
> *The Nanking (D. C. Cal., 1923), 292 Fed. 642;*
> *The Lincoln Land (D. C. Mass., 1923), 295 Fed. 358.*

In the case of *The Oconee* the court had acquired original jurisdiction under a maritime lien for supplies. The United States filed an *intervening* petition claiming priority payment under a preferred mortgage. It was contended that the *whole* Ship Mortgage Act was unconstitutional. No question of jurisdiction was involved as the court had properly acquired jurisdiction over the res.

In the case of *The Nanking* the initiatory libel apparently was for enforcement of a true maritime lien followed by intervening libel by the mortgagee, to which libel exceptions based on claimed unconstitutionality of the Act were overruled.

In the case of *The Lincoln Land* the mortgagee apparently filed the libel, and, so far as the report indicates, a sale occurred before any attack was made on the validity or extent of the mortgage. Intervening libels based on maritime liens for supplies and lighterage were filed and such claimants denied the priority of the mortgage over their claims.

The three cases, as well as those in which constitutionality was assumed, are not in point and present no conflict with the decision of the Court of Appeals herein.

CONCLUSION.

It is respectfully asked that the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE E. BRAND,
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CHARLES S. DESMOND,
Counsel for Respondent.

April 19, 1934.

FILE COPY

In The

Supreme Court of the United States

October Term, 1934.

No. 13.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

v.

STEAMER "THOMAS BARLUM," Her Engines, Etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

No. 14.

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BARLUM STEAMSHIP COMPANY,
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RESPONDENT'S BRIEF.

GEORGE M. BRAND,
THOMAS C. BURKE,
HARRY S. DENNISON,
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RESPONDENT'S BRIEF.

(All Italics Ours.)

Certiorari to review decision of Circuit Court of Appeals reversing decrees of District Court foreclosing

"preferred mortgages" under the Ship Mortgage Act. The District Court opinions are reported in *56 F. (2d) 455*, and *2 F. Supp. 733*. The opinions of the Circuit Court of Appeals are reported in *68 F. (2d) 946*.

STATEMENT OF THE CASES.

On May 18, 1931, petitioner, libelant-mortgagee filed libel 1794 in the District Court at Buffalo to foreclose a $200,000 "preferred mortgage" under the Ship Mortgage Act against the steamer "Thomas Barlum" and also libel 1795 to foreclose a similar mortgage against the steamer "John J. Barlum." Jurisdiction *in rem* was predicated solely on the fact that the mortgages were given and recorded under the Ship Mortgage Act. *The libels did not otherwise allege that the suits were maritime in character or involved maritime liens* (R. 4-9, 39-44). Both steamers were forthwith seized by the marshal upon warrants issued in the proceedings and are still in the marshal's custody.

On June 1, 1931, respondent, Barlum Steamship Company, as claimant, filed claims of ownership as to each steamer (R. 1, 117, 118). On July 14, 1931, respondent filed amended exceptions (R. 75) to each of the libels on the stated grounds that the libels did not state a cause within the admiralty and maritime jurisdiction of the court; that no maritime lien was alleged and that Subsection K of the Ship Mortgage Act, 1920 (46 U. S. C., § 951), *insofar as it purports to permit foreclosure of the mortgages by suit in admiralty*, was unconstitutional. On February 17, 1932, District Judge Adler filed opinion (R. 75-76, reported in *56 F. (2d) 455)*, overruling the exceptions, and orders (R. 77-78) were accordingly entered.

On March 3, 1932, respondent filed answers (R. 78-79) renewing the constitutional objection and, as a further defense, alleging that the mortgage indebtedness was for loans to it almost entirely for nonmaritime purposes, i. e., to enable claimant to loan to other enterprises for reduction of their bank and other indebtedness and to pay cost of construction of buildings—in none of which had claimant any interest—all of which was known to libelant when the mortgages were negotiated, executed and delivered. Libelant filed exceptions (R. 79-80) alleging that the constitutional objection had been determined on respondent's exceptions and that the additional defense was insufficient in law, irrelevant and immaterial (R. 79). On May 27, 1932, Judge Adler filed opinion (R. 80, reported in *2 F. Supp. 733),* sustaining the exceptions to the constitutional defense but overruling the exceptions to the additional defense. Orders were accordingly entered (R. 81) June 7, 1932, and the causes set for hearing.

On March 8, 1932, Parry et al., seamen, were granted leave to intervene and filed intervening libels for wages (R. 81-82). *No process was issued on these libels* and the $2881.91 claimed for wages was not disputed.

The testimony for claimant and libelant was taken by deposition (R. 82-180). After hearing and argument Judge Adler, on March 10, 1933, filed opinion (R. 180-182) sustaining the libels. *Detailed findings of fact and conclusion of law* (R. 199-206) *were made* on April 6, 1933. Foreclosure decrees (R. 182-199) were entered April 13, 1933, from which the appeals were taken on July 10, 1933, to the United States Circuit Court of Appeals of the Second Circuit (R. 207-208). The assignments of error (R. 208-211) alleged, in substance, that the court erred in overruling respondent's exceptions to the libels, in sustaining libelant's exceptions re constitutionality, in

holding that the admiralty court had jurisdiction herein under the Ship Mortgage Act and in not holding that the provision of that act conferring admiralty foreclosure jurisdiction was inapplicable to the mortgages herein or was unconstitutional.

The Circuit Court of Appeals (Judges Manton, Chase and Augustus N. Hand, the latter dissenting), *68 F. (2d) 946*, reversed the decree of the District Court—holding against admiralty jurisdiction to foreclose the particular mortgages involved (R. 215-227).

SCOPE OF CONTENTIONS.

Because the facts involved were exceptional and not typical of ship mortgage transactions, we preface our discussion by the following statement:

> "It is not urged that the Ship Mortgage Act is unconstitutional in its entirety nor that Congress, having power to legislate concerning true maritime liens, could not *subordinate* certain of such liens to other, even common law, liens. It is not urged that a purchase money mortgage or a mortgage placed on a ship to raise funds for maritime purposes would be invalid or necessarily without the jurisdiction of the admiralty court. Such contentions are not necessary or pertinent herein. *What is urged is that these particular mortgages, by intendment of the parties and under the circumstances established by the record, were so devoid of connection with maritime purposes that the provisions of Subsection K of the Ship Mortgage Act, 46 U. S. C., § 951, conferring original foreclosure jurisdiction on the District Court in admiralty, either does not, or cannot constitutionally, apply.*"

This restriction of the issues was clearly recognized by the Circuit Court of Appeals in the prevailing opinion, *68 F. (2d) 948-949* (R. 218), as follows:

> "Appellant argues that these mortgages, as the record establishes, were so devoid of connection with maritime purposes and subjects, that the statute should not be construed to confer and cannot confer original jurisdiction of foreclosure in admiralty * * *.
>
> "If it were established that these mortgages were given to support an issue of bonds 'to develop and encourage the maintenance of such a merchant marine' and therefore in accord with the objects of the Ship Mortgage Act, the admiralty jurisdiction to foreclose would be unquestionable. We need not decide whether or not a loan made for maritime purposes secured by a mortgage on a ship will become nonmaritime if the borrower, contrary to the agreement of the mortgage, diverts the money to nonmaritime purposes, nor need we consider what effect any estoppel in such a case would have. We are not called upon to say whether or not Congress could in any event extend the admiralty jurisdiction to a matter so closely related to transportation by navigable waters as to provide for the exclusive enforcement in admiralty of a mortgage on a ship actually engaged in such transportation. It is sufficient to point out here that the mortgagor and mortgagee both knew in advance of making these mortgages that the moneys advanced were not to be used for such purposes, but were intended for and actually were used for nonmaritime purposes. This was fully disclosed at the trial. * * *
>
> "* * * Nowhere in the Merchant Marine Act or the Ship Mortgage Act is it anywhere shown that Congress intended that ship mortgages given by owners to support outside operations such as real estate ventures or to pay past debts not arising in maritime transactions were in contemplation. Mortgage loans of this character are foreign to the idea of maritime operations. The mortgages in question

having been shown to be nonmaritime in intent and character, the admiralty court did not have jurisdiction, and the application to dismiss the suit should have been granted."

The dissenting opinion erroneously assumes and states (R. 224) that respondent contended that the Congress could not confer the status of a *preferred mortgage* upon any other than a true maritime mortgage. Respondent made no such contention. Respondent did contend that there was a distinction between a preferred *mortgage* lien and a *maritime* lien and between the congressional power to confer preference right upon a nonmaritime mortgage by *subordination* of maritime liens thereto and the power by fiat to *convert a nonmaritime* lien into a *maritime* lien and make it, *per se*, the subject of *original* admiralty jurisdiction.

The dissenting opinion also assumes that unless original foreclosure jurisdiction under Subsection K of the Ship Mortgage Act is upheld herein the power of the Congress to give a mortgage preference in distributions is necessarily destroyed. *That problem is not involved in this record.*

The unusual facts referred to require additional statement.

STATEMENT OF FACTS.

The facts are not in dispute.

Respondent.

Respondent, Barlum Steamship Co., is a West Virginia corporation with principal office at Detroit, Michigan. At the times involved it was, and still is, owner of two steel steamers, plying the Great Lakes, known as the "Thomas Barlum" and "John J. Barlum." John J. Barlum was president and Thomas J. Barlum was secretary, of the company (R. 31). In 1927 and 1928 its 3200 shares were held by 14 stockholders, John J. Barlum holding 2561 shares. In 1929, the company had 11 stockholders, John J. Barlum holding 2651 shares (R. 133-135, 170). As a matter of convenience the company maintained separate bank accounts for the steamers (R. 128) and in separate banks (R. 112).

Other Enterprises.

John J. Barlum was connected with several enterprises. *Detroit Trust Co. for years had done business with Mr. Barlum and certain of these enterprises* (R. 83). *"Barlum Land Co."* was an assumed name used by Mr. Barlum in connection with certain of his individual fee and leasehold real estate holdings including those known as Lawyers Building, Dixie Land and Lewis Hotels. In 1925 Mr. Barlum and wife executed a $1,250,000 bond issue mortgage to Detroit Trust Co. as Trustee covering these properties and thereafter conveyed them to *"Barlum Land & Improvement Co."* a Michigan corporation, in exchange for its entire capital stock (R. 100, 111, 137,

144). *"Barlum Realty Co."* is a Michigan corporation owning a forty-story Detroit office building in which corporation John J., Thomas J. and Louis Barlum, proportions not shown, owned the entire capital stock (R. 112, 144). *"Cadillac Square & Improvement Co."* is a limited partnership association which built, owns and operates a twenty-story hotel known as Barlum Hotel, Detroit (R. 125). The stock in the association is owned by the three Barlum brothers, William B. Thompson and his two sons, and three sisters of the Barlums—neither the Thompsons nor the sisters having any interest in the steamship company (R. 144). *"Thomas Barlum & Sons Co."* was a Michigan corporation engaged in the meat packing business in Detroit. Its stock was owned by John J., Thomas J. and Louis P. Barlum. John was manager and head (R. 136, 144). It had made extensive loans from Detroit Trust Co. (R. 136). *Respondent steamship company had no interest in the stock or assets of Barlum Land Co. (R. 138), Barlum Land & Improvement Co. (R. 123, 138), Barlum Realty Co. (R. 138), Cadillac Square Improvement Co. (R. 125, 138), or Thomas Barlum & Sons Co. (R. 144), nor did any of these have any interest in respondent (R. 138).*

We revert to the transactions leading up to the two mortgages involved in the foreclosure decrees herein.

Prior Mortgages.

$100,000 Mortgage, "Thomas," December 1, 1924.

The first mortgage (not under foreclosure herein) executed by respondent was a $100,000 trust mortgage dated December 1, 1924, on the "Thomas" executed to Detroit Trust Co. as trustee to secure an issue of claimant's bonds guaranteed by John J. Barlum, evidencing a loan

by the trust company to respondent (R. 83, 84, 144). The application by respondent to the Michigan Securities Commission relating to the bond issue stated the purpose of the issue was "Settlement of tax claims with the United States Government based on questions of depreciation and invested capital" (R. 85). The Government at the time was asserting a claim of about $100,000 against respondent for additional income and profits taxes. Respondent had employed a tax expert and got the claim reduced to $74,403.29. Respondent had no other pressing obligation (R. 108-109, 136). Mr. Butler, vice-president of the trust company handled the loan for the trust company and knew the purpose of it (R. 135, 137, 152-153). At the time the loan was made the "Thomas" was laid up (R. 109, 136). The loan was not required for the care or maintenance of the steamer (R. 136). Mr. Butler was informed as to the purpose of the loan (R. 137). The trust company purchased the $100,000 of bonds at par and remitted the entire proceeds to respondent which, after payment of the trust company's expense paid $16,786.27 to *Barlum Land Co.*, $5000 to *Barlum Realty Co.*, and $58,204.24 in temporary reduction of claimant's bank indebtedness. In February and March, 1925, respondent paid the Government $74,403.29 in settlement, using the balance of the proceeds of the loan and procuring the remainder by further bank loan (R. 110-111).

$75,000 Mortgage, "Thomas," February 15, 1927.

In January, 1927, $50,000 remained unpaid on the first $100,000 "Thomas" mortgage. It was decided that the trust company make respondent a refunding loan on the "Thomas." On January 28, 1927, the trust company, per Mr. Butler, vice-president, wrote respondent offering to purchase from it a $75,000 issue guaranteed by John

J. Barlum—the papers to be drawn by the trust company's attorneys—$50,000 of the proceeds to be used to retire the $50,000 balance on the first mortgage (Exhibit 3; R. 153-155, 88-89). The trust company (Exhibit 4; R. 155, 90) accounted for the $75,000 proceeds and $450 interest as follows: Balance first mortgage $51,916.65, 2% premium and expenses $1320.20, remittance to respondent $23,213.15. Respondent deposited the $23,213.15 in its "Steamer Thomas Barlum" bank account at American State Bank (R. 112) and used same as follows: Overdraft $1618.49; wages to the master of the *"John J."* $1000; loans to *Thomas Barlum & Sons Co.* $1800; salaries to office employees $199.68; transferred to account of the *"John J."* $1000; loan to the *Barlum Realty Co.* $12,500; loan to Louis P. Barlum $600; paid to American Spiral Pipe Company on a running account $1840; paid to Boland & Cornelius, claimant's agents for their advancements for past fitting out purposes $2400; paid captain of the "Thomas" $150 and bank $112.37. The $1000 transferred to the account of the "John J." was deposited in a bank account known as "Steamer John J. Barlum" in the National Bank of Commerce, out of which bills allocated to that ship were paid (R. 113-117).

$200,000 Mortgage, "Thomas," March 1, 1929.

This is the mortgage foreclosed by the decree of the District Court herein in suit No. 1794.

By February, 1929, the $75,000 mortgage had been reduced to $50,000. Negotiations were had with the trust company (then known as Detroit and Security Trust Company) for an increased loan (R. 92). On February 21, 1929, the trust company by Mr. Butler, vice-president, wrote respondent (Exhibit 7; R. 156-158, 92-93) offering to purchase, at 97%, $200,000 of bonds secured by mort-

gage on the "Thomas" guaranteed by John J. Barlum, documents to be prepared by the trust company's attorneys, and (R. 157) stating:

> "It is understood that as a condition of the above the proceeds of the purchase of said bonds by us are to be used as follows:
>
> | | |
> |---|---|
> | To pay the note issue now outstanding secured by mortgage on the same steamer | $50,000.00 |
> | Interest on the same from February 15th to which it is now paid up to March 1st, 1929 | 125.00 |
> | Annual fee due the trustee | 25.00 |
> | Closing fee due the trustee | 25.00 |
> | Attorneys' charges estimated | 750.00 |
> | Trustee's fee for certifying new bonds | 200.00 |
> | Cost of printing new bonds estimated | 100.00 |
> | *To take up principal debt of John J. Barlum and Thomas Barlum & Sons now held by us to the amount of* | 100,000.00 |
> | Balance to Steamship Company for repairs and refitting the steamers 'Thomas Barlum' and 'John J. Barlum' for the season of 1929 | 42,775.00" |

The $100,000 debt of Mr. Barlum and Thomas Barlum & Sons Co. was for collateral loans long previously made to them respectively by the trust company and had no relation to respondent. Mr. Butler was fully informed as to the details of such debt (R. 93, 96-98, 105-106) and it was contemplated that the debt should be paid as indicated (R. 139).

The mortgage, prepared by the trust company's attorneys (R. 147), dated as of March 1, 1929, was executed and delivered about March 22, 1929, while the boat was laid up. Exhibit A attached to libel (R. 9-38) is a copy of the mortgage.

The application to the Securities Commission (prepared by the trust company) relating to this $200,000 mortgage, stated the purpose of the issue was to *"refinance"* (R. 95; Exhibit 9, R. 160). As shown by the trust company's statement (Exhibit 8, R. 158-159), it withheld from the proceeds of the issue $50,358.33 to take up the balance of the previous issue, $1545.23 for trustee and attorney fees, printing, recording, etc., and:

"Amount required to take up Thomas Barlum & Sons note being principal and interest		$45,510.00
Amount necessary to take up John J. Barlum note, being principal and interest		33,566.50
Amount to apply on account of principal of John J. Barlum note ..	$20,745.50	
Accrued int. to March 25th..	178.00	
		20,923.50
Balance to Barlum Steamship Company		42,896.44"

Respondent deposited the $42,896.44 in bank account "Steamer John J. Barlum" at National Bank of Commerce and paid therewith about $22,000 of accounts relating to the *"John J."* and transferred $20,000 of the balance to the bank account "Steamer Thomas Barlum" at the American State Bank and out of which were paid running accounts allocated to the "Thomas" on account of its previous season's operations (R. 118-122; Exhibit 19, R. 167-170).

Exhibit 23 (R. 171-172) dated March 7, 1929, is a consent of John J., Thomas J., and Louis P. Barlum, stockholders holding 2641 of the 3200 shares of respondent's stock, to the $200,000 mortgage in question. Exhibit 24 (R. 173-174) dated March 7, 1929, is an accompanying resolution of respondent's directors authorizing the mortgage. Exhibit 8-A (R. 159-160) is respondent's written

authorization to the trust company to disburse the proceeds of the bonds as agreed (R. 94). These documents were prepared by the trust company, respondent not being represented by counsel (R. 147).

$200,000 Mortgage, "John J.," December 15, 1927.

This is the mortgage foreclosed by the decree of the District Court herein in suit No. 1795.

Exhibit 13 (R. 166, 162, 99) is the accepted written offer by the trust company to respondent, dated December 23, 1927, to purchase an issue of $200,000 of its bonds on the "John J." at 98, to be guaranteed by John J. Barlum, documents to be satisfactory to trust company's attorneys. The mortgage, dated as of December 15, 1927 (Exhibit A to libel, R. 44-72), prepared by the trust company's attorneys (R. 147) was executed about January 5, 1928, while the boat was laid up. *The understanding was that $82,281.25 was to be withheld by the trust company to pay $50,000 principal and $32,281.25 interest on the $1,250,000 bond issue mortgage executed by John J. Barlum and wife to the trust company on the individual real estate and leaseholds of Mr. and Mrs. Barlum as aforesaid (this brief, pages ....), and also that $10,000 was to be retained by the trust company and applied on an individual note executed by Mr. Barlum to the trust company dated August 11, 1927, evidencing a personal loan made to Mr. Barlum by the trust company* (Exhibit 15, R. 162-163; Exhibit 15-A, R. 163, 100-101, 140). *Respondent had no connection with such items for which said sums were to be withheld.* Such items, together with certain trustee and attorney fees and expenses, were withheld according to the understanding. The remainder of the proceeds of the loan was deposited in the bank account of the *"Thomas"* and used as follows: Paid to Luke

Manion, engineer of the *"Thomas"* for past season services $500; loan to *Thomas Barlum & Sons Co.* $4000; loan to *Cadillac Square Improvement Co.* $52,500; loan to *Barlum Realty Co.* $18,600; loan to *John J. Barlum personally* $5500 (used by him in paying an individual note held by the Romeo Savings Bank); loan to *Lewis Hotel* $19,000 (being one of the properties covered by the $1,250,000 mortgage given by John J. Barlum and wife to the trust company); paid to the captain of the "John J." $500 for services in connection with that steamer and $2000 was transferred to the "Steamer John J. Barlum" account (R. 122-127). *Out of the entire proceeds of the issue only the $500 paid to the master of the "John J." and the $2000 transferred to its account had any connection with the "John J."* (R. 126).

Application was made by respondent to the Securities Commission as to the bonds (Exhibit 14, R. 162). Exhibit 25 (R. 174-176), dated January 4, 1928, is a consent of John J., Thomas J. and Louis P. Barlum, holding 2716 of the 3200 shares of respondent's stock, to the mortgage in question. Exhibit 26 (R. 176-178), dated January 4, 1928, is an accompanying resolution of respondent's directors authorizing the mortgage. Exhibit 15 (R. 162-163), dated January 7, 1928, is respondent's written authorization to the trust company to disburse the proceeds of the bonds in accordance with the understanding (R. 100). These documents were prepared by the trust company, respondent not being represented by counsel (R. 147).

Defaults.

Respondent admits the defaults in the two mortgages as alleged in the libels, i. e., nonpayment on February 1, 1931, of $25,000 principal of bonds re the "Thomas"

(R. 7, 39), and $50,000 principal of bonds re the "John J." December 15, 1930 (R. 42, 73). The amounts found due by the decrees are not questioned.

Remedy Provided In Mortgages.

The sole remedy for foreclosure stipulated in the mortgages is by seizure and sale "WITHOUT" *process of any kind (R. 22-23, 57-58).*

STATEMENT OF POINTS OF LAW.

I

PRIOR TO THE SHIP MORTGAGE ACT IT WAS SETTLED LAW THAT A SHIP MORTGAGE SECURING A PERSONAL LOAN TO THE SHIPOWNER WAS NOT *EX PROPRIO VIGORE*, FORECLOSABLE IN ADMIRALTY—NOT BECAUSE THE CONGRESS HAD NOT CONFERRED SUCH JURISDICTION—BUT BECAUSE, UNDER THE CONSTITUTION AS INTERPRETED BY THIS COURT, NEITHER THE LOAN, THE PRIMARY CONTRACT, NOR THE MORTGAGE, THE INCIDENT THEREOF, WAS A MARITIME CONTRACT. THE CONGRESS HAS NO POWER TO EXTEND ORIGINAL ADMIRALTY JURISDICTION TO A NONMARITIME CONTRACT (HEREIN, PAGES 17-25).

II.

THE POWER OF THE CONGRESS IN CONNECTION WITH ADMIRALTY CANNOT TRANSCEND THE JURISDICTION DELEGATED BY THE STATES TO THE FEDERAL GOVERNMENT UNDER THE CONSTITUTION. THE OBJECTION HEREIN PRESENTS THE SERIOUS QUESTION WHETHER THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT HAS NOT ENCROACHED UPON THE RESERVED SOVEREIGN POWERS OF THE STATES. THE ATTEMPTED GRANT OF ADMIRALTY JURISDICTION, IF APPLICABLE TO THE MORTGAGES HEREIN, WOULD DEPRIVE THE STATES OF RESERVED JURISDICTION OVER NONMARITIME CONTRACTS BECAUSE FEDERAL ADMIRALTY JURISDICTION IS EXCLUSIVE. NO STATE STATUTE CREATING A MARITIME LIEN, JUSTICIABLE IN ADMIRALTY AND THEREBY WAIVING RESERVED STATE RIGHTS, IS INVOLVED. SUBSECTION K, IF APPLICABLE, IS UNCONSTITUTIONAL (HEREIN, PAGES 26-40).

III.

A FAIR CONSTRUCTION OF THE SHIP MORTGAGE ACT JUSTIFIES A HOLDING THAT IT DOES NOT APPLY TO THE PARTICULAR MORTGAGES INVOLVED. THE ACT SHOULD BE SO CONSTRUED (HEREIN, PAGES 40-43).

IV.

ESSENTIAL JURISDICTION CANNOT BE CONFERRED BY CONSENT OR ESTOPPEL (HEREIN, PAGES 43-45).

LAW ARGUMENT.

MORTGAGE NONMARITIME.

I.

PRIOR TO THE SHIP MORTGAGE ACT IT WAS SETTLED LAW THAT A SHIP MORTGAGE SECURING A PERSONAL LOAN TO THE SHIPOWNER WAS NOT, *EX PROPRIO VIGORE,* FORECLOSABLE IN ADMIRALTY—NOT BECAUSE THE CONGRESS HAD NOT CONFERRED SUCH JURISDICTION—BUT BECAUSE, UNDER THE CONSTITUTION AS INTERPRETED BY THIS COURT, NEITHER THE LOAN, THE PRIMARY CONTRACT, NOR THE MORTGAGE, THE INCIDENT THEREOF, WAS A MARITIME CONTRACT. THE CONGRESS HAS NO POWER TO EXTEND ORIGINAL ADMIRALTY JURISDICTION TO A NONMARITIME CONTRACT.

Article III of the Constitution provides:

> "Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."
>
> "Section 2. The judicial Power shall extend * * * to all Cases of admiralty and maritime jurisdiction; * * *."

Perforce Section 1, supra, the Congress, by the Judiciary Act of 1789, conferred upon the District Courts original jurisdiction:

> "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is

competent to give it, * * *." *28 U. S. C., § 41 (3).*

This court early dispelled the idea that the admiralty jurisdiction thus conferred upon the federal courts was the circumscribed power of the English admiral at the time of the adoption of the Constitution.

> *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston (1848), 6 How. 344, 12 L. Ed. 465.*

That this court was fully conscious of the desirability of making federal admiralty jurisdiction as comprehensive as the needs of navigation, is attested by the above case as well and by the decision of *The Genesee Chief (1851), 12 How. (53 U. S.) 443, 13 L. Ed. 1058,* holding that the admiralty jurisdiction was not limited to tide waters. Certainly this court accorded the constitutional provisions a broad, rather than a restricted, interpretation and in view of such a tendency this court's refusal to uphold jurisdiction over ship mortgages is of great significance.

Bogart v. The Steamboat John Jay (1854), 17 How. (58 U. S.) 399, 15 L. Ed. 95: Libelants had sold the steamer to McMurray, taking a purchase money mortgage for part of the sale price. Upon default in payment of the mortgage note libelants filed libel against the steamer.

> "To this libel George Logan, by way of answer, put in a claim of ownership of The John Jay, by a *bona fide* purchase from McMurray; and he further denies the jurisdiction of the court, upon ground that the contract between the libelants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction * * *.
>
> "Upon the hearing of the cause in the District Court, the libel was dismissed * * *. We think that the affirmance of the judgment of the District Court was right, and will here briefly give our reasons for that opinion.

"It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune, 3 Hagg., Adm. Rep. 132,* Sir John Nicholl, in giving his judgment, observes: 'Now, upon questions of mortgage, the Court of Admiralty has no jurisdiction, whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, *the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty,* which never decide on questions of property between the mortgagee and owner.'

"This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. *Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime."*

There was no dissent from this opinion and seven of the justices who participated in the decision of The Genesee Chief in 1851 were still members of this court.

Schuchardt v. Ship Angelique (1856), 19 How. (60 U. S.) 239, 15 L. Ed. 625.

Mortgagees filed *libel* in the District Court against the proceeds of a ship sold under decrees entered upon other libels based on maritime liens. The court dismissed the mortgagee's libel, saying:

> *"The libel filed in this case is a libel simply to foreclose a mortgage, or to enforce the payment of a mortgage, and the proceeding cannot therefore be upheld within the case of Bogart v. The John Jay, heretofore decided by this court (17 How.) 58 U. S. 399.*
>
> *"The proper course for the mortgagees was to have appeared as claimants to the libels filed against the vessel, in which the questions presented in the case might have been raised and considered; * * *."*

The People's Ferry Co. v. Beers (1858), 20 How. (61 U. S.) 393, 15 L. Ed. 961.

Libel against a new ferry boat for balance due the builders for its construction under a contract reserving a lien to secure payment. The District Court upheld admiralty jurisdiction. In reversal, this court said:

> "The lien reserved by the contract, is not set up in the libel, *nor can it avail, as it amounted to nothing more than a mortgage on the vessel for a debt.* * * *
>
> *"The question presented involves a contest between the State and Federal Governments. The latter has no power or jurisdiction beyond what the Constitution confers; * * *. The extent of power withdrawn from the States, and vested in the General Government, depends on a proper construc-*

tion of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now; what was reserved to the States, to be regulated by their own institutions, cannot be rightfully infringed by the General Government, either through its Legislative or Judiciary Department. The contest here is not so much between rival tribunals, as between district sovereignties, claiming to exercise power over contracts, property, and personal francises. * *

"The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation. * *

"In considering the foregoing description, it must be borne in mind that liens on vessels encumber commerce, and are discouraged; so that where the owner is present, no lien is acquired by the materialman; nor is any, where the vessel is supplied or repaired in the home port * * *. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), *it was a contract made on land, to be performed on land.* The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built; they were bound to rely on their contract." * * *

Accord: *Grant Smith-Porter Co. v. Rohda, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008; Thames Towboat Company v. The Schooner Francis McDonald, 254 U. S. 242, 41 S. Ct. 65, 65 L. Ed. 245.*

The Lottawanna (1874), 21 Wall. (88 U. S.), 558, 22 L. Ed. 654:

"In this case the appellants themselves have no

maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court, except under the 43rd Admiralty Rule, and in the manner above indicated."

The J. E. Rumbell (1892), 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345:

> *"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it or to assert either title or right of possession under it* * * *. But it has jurisdiction, after a vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case. * * *
>
> *"The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien,* * * *."

The Freights of the Kate (D. C. N. Y.), 63 Fed. 707, 720, in which Mr. Justice Brown said:

> "A letter of credit, like a loan of money, is in itself indifferent in character; it may be maritime, or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it. Maritime contracts are contracts that pertain to maritime commerce and navigation. A letter of credit issued for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is as purely maritime as a bottomry bond; and no commercial transactions are more characteristically maritime than these."

THE BONDS ARE THE PRIMARY OBLIGATIONS TO WHICH THE MORTGAGES ARE MERE INCIDENTS.

Carpenter v. Longan, 16 Wall. (83 U. S.) 271, 21 L. Ed. 313.

The foregoing decisions (pages 18-23 hereof) state the factors which render a loan and ship mortgage non-maritime in character. The loans herein were merely *personal* contracts, in no way involving navigation or the perils of the sea. The mortgages were mere *security* for performance of the personal contract and in no way involved the use of the steamers in navigation.

MARITIME LIENS ENCUMBER COMMERCE AND ARE *STRICTI JURIS.*

Krauss Bros. Lumber Co. v. Dimon S. S. Corp., Vol. 78 Adv. Op. page 91;
Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 S. Ct. 1, 65 L. Ed. 97;
The Kalfarli (C. C. A. 2), 277 Fed. 391;
The People's Ferry Co. v. Beers, infra, page 20.

Subsection P of the Ship Mortgage Act (46 U. S. C. § 971) quoted in petitioner's brief, page 54, creates a lien enforceable by suit *in rem* for repairs, supplies, etc., to all ships, without the necessity of proving that credit was given to the vessel. So far as pertinent this section is the same as Section 1 of Act June 23, 1910, c. 373 (36 Stat. at L. 604), which was construed in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., supra* petitioner's brief, page 25) to exclude admiralty jurisdiction to enforce a lien for coal furnished to an embarrassed canning and fishery company *for use in its factory and fishing steamers on the understanding that*

under the law the coal company would have such a lien. This court commented:

> "And it was clearly understood that the purchasing corporation would apply part of the coal to a non-maritime use."

THE FACT THAT THE CONTRACTS INVOLVED WERE NOT WHOLLY MARITIME WOULD PRECLUDE ORIGINAL ADMIRALTY JURISDICTION.

Grant v. Poillon, 20 How. (61 U. S.) 162, 15 L. Ed. 871:

Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co. ante, page 23.

Pillsbury Flour Mills Co. v. Interlake SS. Co. (C. C. A. 2), 40 F. (2d) 439, certiorari denied in *282 U. S. 845, 51 S. C. 24, 75 L Ed. 750:* Libel for damage to wheat shipped under contract for transportation from Milwaukee to Buffalo and winter storage at destination. In denying admiralty jurisdiction the court said:

> "'A contract to be "wholly maritime," means that the principal subject matter of agreement gives character to the whole.' * * *. After reviewing the cases, we concluded that contract rights are maritime and within the admiralty jurisdiction when they relate to the ship as an instrument of commerce, and pointed out that a contract for the wharfage of a ship withdrawn from commerce is not maritime and will not support a maritime lien."

The Richard Winslow (C. C. A. 7), 71 Fed. 426:

> "*A maritime contract must therefore concern transportation by sea. It must relate to navigation, and to maritime employment. It must be one of navigation and commerce on navigable waters.* Unquestionably there was here a contract for carriage by sea, and that contract was maritime in its nature.

But there was joined with it a contract with respect to the cargo after the completion of the voyage that was in no respect maritime in its nature.''

Accord: *The Milwaukee (D. C. N. Y.), 15 F. (2d) 886; El Oriente (D. C. N. Y.), 5 F. (2d) 251.*

ADMIRALTY COURTS ARE NOT COURTS OF EQUITY.

Bogart v. The Steamboat John Jay, infra page 18;

The People's Ferry Co. v. Beers, infra page 20;

Rea v. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269;

The Ada (C. C. A. 2), 250 Fed. 194;

Kellum v. Emerson, Fed. Cas. No. 7669.

CONGRESS—LACK OF POWER.

II.

THE POWER OF THE CONGRESS IN CONNECTION WITH ADMIRALTY CANNOT TRANSCEND THE JURISDICTION DELEGATED BY THE STATES TO THE FEDERAL GOVERNMENT UNDER THE CONSTITUTION. THE OBJECTION HEREIN PRESENTS THE SERIOUS QUESTION WHETHER THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT HAS NOT ENCROACHED UPON THE RESERVED SOVEREIGN POWERS OF THE STATES. THE ATTEMPTED GRANT OF ADMIRALTY JURISDICTION, IF APPLICABLE TO THE MORTGAGES, WOULD DEPRIVE THE STATES OF RESERVED JURISDICTION OVER NONMARITIME CONTRACTS BECAUSE FEDERAL ADMIRALTY JURISDICTION IS EXCLUSIVE. NO STATE STATUTE CREATING A MARITIME LIEN, JUSTICIABLE IN ADMIRALTY AND THEREBY WAIVING RESERVED STATE RIGHTS, IS INVOLVED. SUBSECTION K, IF APPLICABLE, IS UNCONSTITUTIONAL.

Vide, *The People's Ferry Co. v. Beers, infra, page 20,* and *The Genesee Chief, infra, page 18.*

The New England Marine Ins. Co. v. Dunham, 11 Wall. (78 U. S.) 1, 20 L. Ed. 90:

> *"As far as regards civil cases, therefore, the jurisdiction of these courts was thus made coextensive with the constitutional gift of judicial power on this subject."*

No interstate commerce is involved in the present controversy. It is significant that in Article I, Section 8 of

the Constitution, defining the power of the Congress, the subject of admiralty is not mentioned. The connection of the Congress with that subject is through Article III, Section 1 which permits the Congress to *apportion the judicial power conferred by the states but which cannot sustain an arrogated increase of power.*

Crowell v. Benson, 285 U. S. 22, 55, 52 S. Ct. 285, 76 L. Ed. 598, 615, upholding The Longshoremen's and Harbor Workers' Act providing compensation to workmen for injuries occurring *upon navigable waters.* This court, by Mr. Chief Justice Hughes, said:

> *"These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.*
>
> *"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction* * * *. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations."* * * *

THE CONGRESS CANNOT ENLARGE THE GRANT OF ADMIRALTY JURISDICTION.

Crowell v. Benson, supra;

Meyer et al. v. Tupper (1861), 1 Black (66 U. S.) 522, 17 L. Ed. 180;

The Lottawanna (1874), 21 Wall. (88 U. S.), 588, 22 L. Ed. 654.

FEDERAL ADMIRALTY JURISDICTION TO ENFORCE A LIEN IS EXCLUSIVE. SUBSECTION K OF THE SHIP MORTGAGE ACT EXPRESSLY PROVIDES THAT JURISDICTION THEREUNDER SHALL BE EXCLUSIVE.

Prior to the Ship Mortgage Act an ordinary ship mortgage securing a general loan to the ship owner was a local matter and, as such, was within the jurisdiction of the state courts both as to actions *in personam* and *in rem*. If the Congress, by its fiat, can convert such a mortgage into a maritime lien, the jurisdiction of the state is automatically divested. This, it is respectfully contended, cannot be done without the approval of the state or amendment of the Constitution.

That it should not be done is also clear. For example, take the mortgages herein. The steamers were laid up in Buffalo when the mortgages were executed and delivered. They might never have left the Buffalo docks before default. Could the state courts of New York constitutionally be deprived of foreclosure jurisdiction in such event? Supposing these were construction mortgages and the steamers had not been completed and the mortgages became in default. Could not the state courts entertain foreclosure? That the state courts would have such jurisdiction is clear. That they would lose such jurisdiction if Subsection K is upheld is equally clear. That the state courts cannot be deprived of such rights would seem to follow although it is not necessary to go that far to decide the instant cases. We stress the statement that no state statute creating an admiralty lien, *and thereby surrendering the state's jurisdiction*, is involved and refer to the following text and cases which indicate the circumstances under which a state's power may become subordinate to federal admiralty jurisdiction.

1 Ruling Case Law:

"Where a state statute creates a new right of ac-

tion *touching a subject which is held to be maritime in its nature,* the District Court may give effect to the enactment by a suit *in rem,* if the statute gives the lien necessary to support that form of proceeding, or by a suit *in personam* in case no lien is granted. Nor is such an enactment invalid because the state courts have no jurisdiction to enforce it by a proceeding *in rem.* The District Courts are not bound to enforce liens created by state laws, but will do so nevertheless whenever the interests of justice will be promoted and the provisions of the statute are not antagonistic to or in derogation of the principles of the maritime law. *Of course the right of action created by the statute must arise out of a transaction which relates to navigation and things maritime*" (p. 408).

(Referring to the Judiciary Act of 1789): "The states are held thereby to be prohibited from establishing courts having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty; *and hence a state court can have no jurisdiction of a suit in rem which is cognizable by the District Court.* * * * (pp. 408-9)

"As previously shown, the states may not give their courts the right to proceed *in rem* for maritime causes of action. All causes which the admiralty courts have declared to be maritime in character, and which those courts have held to give rise to maritime liens, are within the jurisdiction of the District Courts exclusively * * *. Thus, for example, contracts for the construction of vessels, and for the furnishing of materials therefor, before they are launched, being nonmaritime, liens and proceedings *in rem* to enforce such liens are under state control, and may be enforced in the state courts. * * * p. 410)

"It remains to consider the jurisdiction of a state court to enforce by proceedings *in rem* a lien given by local statute in aid *of a cause which the admiralty courts have held to be maritime in character* but not supported by a lien under the general maritime law.

It is established that a lien created by such a statute is so far maritime that the admiralty courts may enforce it by process *in rem;* and while there seems to have been at one time some difference of opinion on the point, and some state decisions are to the contrary, the Supreme Court now declares *the jurisdiction of the District Courts to be exclusive in such cases, denying the power of local statutes to confer upon the state courts jurisdiction of proceedings in rem, even though the maritime law does not give a lien.*" * * * (p. 411)

The Winnebago (C. C. A. 6), 141 Fed. 945, certiorari denied, *200 U. S. 616, 50 L. Ed. 621:*

"Passing from these predicates, we observe that *it is also to be accepted as settled law that contracts, whether for the building of ships or for furnishing materials for their construction are not maritime in their nature, nor are liens given upon ships while in course of construction maritime liens.* This doctrine was affirmed by this court in *The John B. Ketchem, 97 Fed. 872, 38 C. C. A. 518,* and is supported by many decisions of the Supreme Court. * * *

"*It seems to follow by obvious sequence that, in creating liens of this character and conferring upon their own courts the power to enforce them, state legislation does not derogate from the jurisdiction of the admiralty courts of the United States* * * *. *If the contract is not of a maritime nature, it is of no concern to the federal jurisdiction what remedies the state may provide, whether in rem or otherwise. 'If,' said Mr. Justice Brown, in Knapp, Stout & Company v. McCaffrey, supra, 'a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state.* Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or material furnished in its construction, * * * we held, in *Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487,* that, in respect to such contracts, it was competent

for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem.*' The *owner of a ship may make a nonmaritime contract and mortgage his ship to secure it, or it may be seized on mesne or final process; and in both cases the ship may be sold for the satisfaction of the debt on the order of a common law court without recourse to the admiralty jurisdiction.*"

The Moses Taylor v. Hammons, 4 Wall. (71 U. S.) 411, 18 L. Ed. 397. California statute provided for state court proceedings *in rem* against a ship for nonperformance of contracts of transportation. In holding that the state court had no such jurisdiction Mr. Justice Field said:

"The question presented for our determination is, therefore, whether such cognizance by the Federal Courts is exclusive; and this depends either upon the constitutional grant of judicial power, or the validity of the provision of the 9th section of the Act of Congress. * * *

"The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal Courts, recognizes and is framed upon the theory *that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal Courts.* * * *

"The case before us is not within the saving clause of the 9th section. That clause only saves to suitors 'the right of a common law remedy, where the common law is competent to give it.' *It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding in rem, as used in the admiralty court is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute.*"

The last quoted paragraph was quoted with approval in the recent case of *Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171.*

The Belfast, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266. Alabama statute provided for lien for supplies furnished ships within the state and enforcement by libel in state courts. Libel dismissed.

> "Original cognizance is exclusive in the District Courts, except that the suitor may, if he sees fit, elect to pursue a common law remedy in the state courts, or in the Circuit Court, as before explained, in all cases where such a remedy is applicable. *Common law remedies are not applicable to enforce maritime lien by a proceeding in rem and, consequently, the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts. The Moses Taylor,* * * *.
>
> "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the Admiralty Courts." * * *

Leon v. Galceran, 11 Wall. (78 U. S.) 185, 20 L. Ed. 74. Right to proceed *in personam* in state court for mariner's wages upheld.

> "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceedings *in rem*, as practiced in the admiralty courts; but whenever a maritime lien arises the injured party may pursue his remedy by a suit *in personam* or by a proceeding *in rem* at his election. *Such a party may proceed in rem in the admiralty, and if he elects to pursue his remedy in that mode, he cannot proceed in any other form, as the jurisdiction of the admiralty courts is exclusive in respect to that mode of proceeding*, but such a party is not

restricted to that mode of proceeding even in the admiralty court, as he may waive his lien and proceed *in personam* against the owner or master of the vessel in the same jurisdiction, nor is he compelled to proceed in the admiralty at all, as he may resort to his common law remedy in the state courts, or in the Circuit Court, if he and his debtor are citizens of different states. * * *

"*Common law remedies are not competent to enforce a maritime lien by a proceeding in rem and, consequently, the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts* * * *. Authority, therefore does not exist in a state court to hear and determine a suit in rem, founded upon a maritime contract in which a maritime lien arises, for the purpose of enforcing such a lien. Jurisdiction in such cases is exclusively in the District Courts,* subject to appeal as provided in the acts of Congress, but such a lien does not arise in a contract for material and supplies furnished to a vessel in her home port, *and in respect to such contracts it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.*"

Norton v. Switzer, 3 Otto (93 U. S.) 355, 23 L. Ed. 903, holding maritime lien does not arise under contract for ship repairs in home port.

"Authority does not exist in the state courts to hear and determine a suit *in rem* as in the Admiralty Courts to enforce a maritime lien * * *.

"Contracts for ship building are held not to be maritime contracts and, of course, they fall within the same category; *but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding in rem is exclusive in the District Courts sitting in admiralty.*"

The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345. Question whether priority of a mortgage given by state statute over maritime liens was binding in admiralty. Mr. Justice Gray said:

> "In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful: * * *
>
> "For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute * * *.
>
> "*Whenever the statute of a state gives a lien to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States.* * * *
>
> "*This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty.* * * *
>
> "The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a state. *No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure.* * *

"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it * * *. But it has jurisdiction, after a vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case * * *.

"It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien *because it is maritime in its nature, arising upon a maritime contract,* must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. Ed. 770. State statute provided for priority lien on ships for repairs and enforcement thereof in admiralty. Libel for such lien was filed in the Federal District Court:

"* * * we have several times had occasion to hold that where Congress has dealt with a subject within its exclusive power, *or where such exclusive power is given to the Federal Courts, as in cases of admiralty and maritime jurisdiction, it is not competent for states to invade that domain of legislation, and enact laws which in any way trench upon the power of the Federal Government.* * * *

"Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the Federal Courts, * * * the statute of the state of Washington, insofar as it attempts to control the administration of the maritime law by creating and superadding conditions for the

benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void."

American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 522, 21 L. Ed. 369:

"* * * *Jurisdiction to enforce maritime liens by proceedings in rem is exclusive in the admiralty courts.* State courts, therefore, are incompetent to afford a remedy in such a case, as they do not possess the power to issue the appropriate process to enforce the lien and give effect to the proceeding. Vested exclusively as such power is in the admiralty courts, it is settled law that the state legislatures cannot authorize state courts to exercise jurisdiction in such a case by a proceeding *in rem.*"

Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73, opinion by Mr. Justice Brown:

"This case raises the question of the construction and constitutionality of the statutes of the state of New York, giving a lien for repairs upon vessels, and providing for the enforcement of such lien by proceedings *in rem* * * *. That a state may provide for liens in favor of materialmen for necessaries furnished to a vessel in her home port, or in a port of the state to which she belongs, *though the contract to furnish the same is a maritime contract,* and that such liens can be enforced by proceedings *in rem* in the District Courts of the United States, is so well settled by a series of cases in this court as to be no longer open to question.

* * *

"It is equally well established that, *for causes of action not cognizable in admiralty, either in rem or in personam, the states may not only grant liens, but may provide remedies for their enforcement.* Contracts for the building of a ship are the most prom-

inent examples of such as are not maritime in their character, and hence within this rule. * * *

"In all these cases the distinction is sharply drawn between a common law action *in personam,* with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, *and a proceeding in rem against the vessel as the debtor or 'offending thing,' which is the characteristic of a suit in admiralty.* * * * The former is in strict analogy to a common law proceeding, and is a concurrent remedy. *The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts.*"

THE CONGRESS MAY PRESCRIBE FORMS, MODE AND RULES OF JUDICIAL PROCEEDINGS WITHIN THE DEFINED ADMIRALTY JURISDICTION OF THE COURTS BUT CANNOT MAKE MARITIME A NONMARITIME CAUSE OR TRANSACTION. WITHIN SUCH CONFINES ONLY CAN IT BE SAID THAT THE CONGRESS MAY AMEND THE ADMIRALTY LAW. ANALYSIS WILL DISCLOSE NO DECISION UPHOLDING CONGRESSIONAL REGULATION EXCEPT AS TO A MATTER UNQUESTIONABLY MARITIME.

For example:

In *The General Smith, 4 Wheat. 438, 4 L. Ed. 609,* this court drew the sharp distinction between "process" and "jurisdiction" saying that the creation by local law of a lien enforceable *in rem* in admiralty for ship supplies was merely to supply a *process* in connection with *existent maritime jurisdiction because the contract for supplies was in itself maritime and within the established jurisdiction of the admiralty court to proceed in personam. Nothing more than a mode of procedure was involved.*

In *Meyer et al. v. Tupper et al., 1 Black (66 U. S.), 522, 17 L. Ed. 180,* the same view was taken as to *Admiralty Rule 12* recognizing such liens.

In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 27 L. Ed. 1038, this court said:*

> "The rule of *limited liability* prescribed by the Act of 1851 is nothing more than the old maritime *rule* administered in courts of admiralty in all countries except England from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law."

The underlying cause of action involved was unquestionably maritime and over which the admiralty court had jurisdiction. *The act of Congress merely controlled the procedure relating to the enforcement of that jurisdiction and, in our opinion, did no more than alter a rule of recoverable damages in such cases.* The same is true of *Richardson v. Harmon, 222 U. S. 96, 32 S. Ct. 27, 56 L. Ed. 110,* on which petitioner relies, wherein the underlying cause of action was the liability of a ship which, in its navigation, damaged a bridge.*

In *Crowell v. Benson, infra, page 27,* cited also by petitioner, the claims to which the Act applied were within the admiralty jurisdiction. This court therein specifically repudiated the idea that the Congress could create a maritime *cause of action* where none previously existed and denied that the Congress could even substitute findings for ultimate court decision as to the existence of *jurisdictional* facts.

Panama R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, upheld the Jones Act on the theory that it

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*Similarly, in *Vancouver S. S. Co. v. Rice, 288 U. S. 445, 53 S. Ct. 420, 77 L. Ed. 885,* the injuries to the stevedore were inflicted on the vessel in the course of loading in navigable waters. The lien on the vessel given by the state statute for the resulting death on shore was held to be subject to admiralty jurisdiction.

did not create a maritime cause of action but merely regulated procedure.

To create a lien in connection with a matter already subject to maritime jurisdiction is one thing—*but to attempt thereby to create jurisdiction where none existed is another.* That the existence of a lien merely has not been an accepted basis of our admiralty jurisdiction is also attested by the fact that under the civil law many liens against ships existed that were not enforceable in original proceedings *in rem* under our law because the underlying cause of action was, by our courts, held to be nonmaritime.

The states have not voluntarily yielded their control over nonmaritime mortgages and until they do, it is respectfully submitted, the Congress cannot arbitrarily force them to do so by conferring exclusive jurisdiction thereover upon the federal courts. Subsection K is unconstitutional, if it is applicable.*

*We see nothing in *United States v. Flores, 289 U. S. 137, 53 S. Ct. 580, 77 L. Ed. 1086* (petitioner's brief, page 36), which militates against our contentions. The murder, in that case, was committed on an American vessel while unloading in a foreign port. Both the crime and the operation of the ship were within the recognized scope of maritime jurisdiction.

APPLICABILITY OF SUBSECTION K, SHIP MORTGAGE ACT.

III.

A FAIR CONSTRUCTION OF THE SHIP MORTGAGE ACT JUSTIFIED THE HOLDING THAT IT DOES NOT APPLY TO THE PARTICULAR MORTGAGES INVOLVED. THE ACT SHOULD BE SO CONSTRUED.

Crowell v. Benson, infra, page 27:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case."

Accord: *Panama R. R. Company v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748.*

Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239:

> "A statute may be invalid as applied to one state of facts, and yet be valid as applied to another."

The Ship Mortgage Act is also known as Section 30 of the Merchant Marine Act 1920. *Vide* historical notes to 46 U. S. C. A., § 861 and § 911.

Petitioner argues that the decision below will defeat the desired and necessary results which the Merchant Marine Act was designed to accomplish.

Section 1 of the Merchant Marine Act, 1920, 46 U. S. C., § 861, reads:

> "It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this chapter, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained."

We can easily perceive that the Congress might have power to extend admiralty jurisdiction to matters *directly connected with maritime operations* and that it might be contended successfully that a ship construction or purchase money mortgage, executed as an incident to placing, continuing or maintaining the ship in operation and navigation, is a proper subject for federal legislation, *but the Ship Mortgage Act and the Merchant Marine Act may be searched in vain for any indication that ship mortgages given by shipowners for construction and operation of office buildings and hotels and payment of real estate bonds and personal obligations of others, would so contribute to the purposes of the acts as to be within their contemplation. Such mortgages are not only foreign, but in fact opposed, to the true intent and purpose of the acts.* That such a conclusion is not without

judicial support is evident from the following statement in *People's Ferry Co. v. Beers, infra, page 20:*

> "* * * it must be borne in mind that liens on vessels encumber commerce and are discouraged; * * *."

That the liens against The Thomas and The John J. have encumbered commerce is attested by their consequent enforced idleness since May, 1931.

Petitioner's counsel in appendix to their brief, pages 44-45, quoting the Ship Mortgage Act, omitted § 954 thereof (46 U. S. C., § 954) providing:

> "(a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit *in personam* in admiralty in a District Court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.
>
> "(b) This chapter shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit *in rem* in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels."

It would seem that this provision, like the entire act, is dehors the power of the Congress unless restricted in scope to maritime contracts.

Section 36 of the Merchant Marine Act, 46 U. S. C., § 887, provides:

> "If any provision of this and the following chapter is declared unconstitutional *or the application of any*

provision to certain circumstances be held invalid, the remainder of such chapters and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

The "following chapter" referred to is the Ship Mortgage Act.

Even in the absence of such a saving clause the courts have generally held that partial invalidity does not necessarily require holding an entire act unconstitutional. For federal cases making elision and enforcing remainder see list appended to the decision in *Roberts v. Atlantic Oil Producing Co. (C. C. A. 6), 295 Fed. 16, 19.*

It is significant that the Congress in Subsection K of the Ship Mortgage Act did not attempt to say that a preferred mortgage created by the act was to be a *"maritime lien"* but merely provided that such be a *"preferred mortgage lien."* It is submitted the act should not have been accorded an unconstitutional purpose but was properly held, as to Subsection K, inapplicable to the mortgages herein. The act, even if inapplicable to the instant mortgages can nevertheless be applicable to all maritime mortgages and even as to nonmaritime mortgages may possibly have the lawful effect of establishing the *basis of priority* as against true maritime liens.

IV.

ESSENTIAL ORIGINAL ADMIRALTY JURISDICTION CANNOT BE CONFERRED BY CONSENT OR ESTOPPEL.

Counsel's suggestion of an estoppel would be material if respondent was denying the validity or preferred

status of the mortgages as mortgage liens rather than questioning the essential original jurisdiction of the court to foreclose them.

Petitioner's counsel seem to have exaggerated the consequences which will follow affirmance.

On pages 28-29 of petitioner's brief are cited:

The Oconee (D. C. Va., 1922), 280 Fed. 927;
The Nanking (D. C. Cal., 1923), 292 Fed. 642;
The Lincoln Land (D. C. Mass., 1923), 295 Fed. 358.

In the case of *The Oconee* the court had acquired original jurisdiction under a maritime lien for supplies. The United States filed an *intervening* petition claiming priority payment under a preferred mortgage. It was contended that the *whole* Ship Mortgage Act was unconstitutional. No question of jurisdiction was involved as the court had properly acquired jurisdiction over the res.

In the case of *The Nanking* the initiatory libel apparently was for enforcement of a true maritime lien followed by *intervening* libel by the mortgagee, to which libel exceptions based on claimed unconstitutionality of the Act were overruled.

In the case of *The Lincoln Land* the mortgagee apparently filed the libel, and, so far as the report indicates, a sale occurred before any attack was made on the validity or extent of the mortgage. Intervening libels based on maritime liens for supplies and lighterage were filed and such claimants denied the priority of the mortgage over their claims.

The three cases, as well as those in which constitutionality was assumed, are not in point and present no conflict with the decision of the Court of Appeals herein.

CONCLUSION.

It is urged that the decrees of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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September 24, 1934.